IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

NO. 88-1251

ROBERT G. REDMAN,

Petitioner,

v.

CURTIS LEE CLARK,

Respondent.

BRIEF IN OPPOSITION TO

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

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BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. SHOULD A PETITION FOR CERTIORARI BE GRANTED WHERE:

A.) THE PETITIONER FAILED IN THE COURTS BELOW TO RAISE OR OTHERWISE PROPERLY PRESERVE THE QUESTION PRESENTED FOR REVIEW; AND,

B.) THE PURELY FACTUAL NATURE OF THE QUESTION PRESENTED FOR REVIEW IS SPECIAL AND IMPORTANT ONLY TO THE PARTICULAR PARTIES?

II. WHETHER THE CREDIBILITY ASSESSMENT OF WITNESSES WHO WERE CALLED UPON TO TESTIFY AT EVIDENTIARY HEARINGS IN THE STATE TRIAL COURT AND FEDERAL DISTRICT COURT, (WHICH FORMED THE BASIS FOR THE CONCLUSIONS THAT TRIAL COUNSEL HAD RENDERED EFFECTIVE ASSISTANCE), WERE HISTORIAL FINDINGS OF FACT PRESUMED TO BE CORRECT UNDER 28 U.S.C. §2254(d)[28 U.S.D.S. §2254(d)]; AND/OR, WERE BINDING UPON THE SIXTH CIRCUIT COURT OF APPEALS UNDER THE CLEARLY ERRONEOUS STANDARD OF REVIEW OF FRCP RULE 52(a)?

PARTIES

The Petitioner, ROBERT G. REDMAN, at the time of the filing of Respondent's Petition for a Writ of Habeas Corpus, was the Warden of the Huron Valley Men's Facility, a prison complex maintained by the State of Michigan, Department of Corrections, located at 3201 Bemis Road, Ypsilanti, Michigan 48197. Tekler Miller was automatically substituted as the Petitioner in this case when she assumed interim office, replacing Robert G. Redman. U.S. Supr. Ct. Rule 40.3, 28 U.S.C.A.; FRCP Rule 25(d).

The Respondent, CURTIS LEE CLARK, also known as Prisoner Number 110340, is currently a prisoner of the State of Michigan, in custody of the Michigan Department of Corrections, and is currently incarcerated at the Huron Valley Men's Facility.

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CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

This case involves Amendment VI to the Constitution of the United States which states, as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained b law, and to be informed of the nature a d cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

This case also involves Section 1. of Amendment XIV to the Constitution of the United States which provides, as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statute involved in this case is 28 U.S.C. §2254(d)[28 U.S.C.S. §2254(d)] which provides, in material part, as follows:

> "(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction * * * shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> * * * * *
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> * * * * *
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made pertinent to a determination of the sufficiency of the evidence to support such factual determination, * * * and the federal court on a consideration of such part of the record as a whole concludes that

> such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) through (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

This case also involves FRCP Rule 52(a) which provides, in material part, as follows:

> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

STATEMENT OF THE CASE

Respondent, Curtis Lee Clark, was arrested on January 3, 1975 and was charged in the Recorder's Court for the City of Detroit with Murder in the First Degree. M.C.L.A. §750.316; M.S.A §28.548.

William Price was initially appointed by the trial court to represent Respondent on the charge. However, following the preliminary examination, and after consultation with Respondent, Mr. Price petitioned the trial court for permission to withdraw as counsel, inasmuch as his trial calendar would not permit him time to interview the several witnesses that Respondent had in the State of Ohio. Robert Stern was ultimately appointed to represent the Respondent at trial.

On the first day of trial, Respondent made several pro se motions to the trial court. Respondent at one point protested to the court that "[y]ou hampered my defense by keeping me locked up and I can't find several of my witnesses." Respondent did not, however, specifically refer to his witnesses as "alibi"

witnesses. The next day, Respondent asked the trial judge to discharge Mr. Stern and appoint another attorney, but the trial judge refused to do so.

The prosecution presented fifteen witnesses during the course of the trial. Only one witness, Judy Malone, implicated Respondent in the murder. Ms. Malone testified, inter alia, that Augustus Jackson-El, known as "Little Jack", was with Respondent on the night of the murder.

Little Jack, at the time of Respondent's trial, was serving a sentence in the State prison on an unrelated conviction. Neither the prosecutor, nor defense counsel, called Little Jack as a witness at the trial. Mr. Stern presented no witnesses at all.

On October 24, 1975, the jury convicted Respondent of first-degree murder. He was subsequently sentenced to a term of mandatory life imprisonment.

Barry Solomon, trial counsel's law partner, was appointed by the trial court to represent Respondent on direct appeal. Respondent's appeals were unsuccessful in the State courts He then sought a writ of habeas corpus in the federal district court, grounded on the same issues raised on direct appeal in the State courts. The petition was denied by the district court, and was affirmed by the Sixth Circuit Court of Appeals. Clark v. Anderson, 611 F.2d 371 (6th Cir., 1979)[Table].

Respondent returned to the State trial court where he filed a delayed motion for a new trial grounded on claims of ineffective assistance of trial and appellate counsel. He relied upon three instances in which his trial counsel was allegedly constitutionally deficient: (1) counsel failed to call Respondent to testify in his own behalf at trial (this claim was abandoned on appeal); (2) counsel failed to investigate and interview a number of witnesses who would have provided Respondent with an alibi for the time of the murder; and (3) counsel failed to investigate and interview a witness who would have directly contradicted the testimony of the one prosecution witness who implicated Respondent in the murder. Respondent claimed that he was deprived of effective assistance of appellate counsel by the refusal to raise on direct appeal the

issue of the ineffective assistance of trial counsel. However, following an evidentiary hearing in the Recorder's Court for the City of Detroit, the delayed motion for a new trial was denied. The Court of Appeals of Michigan and the Supreme Court of Michigan each denied Respondent's applications for leave to appeal. People v Clark, 417 Mich. 1065 (1983)

Respondent filed a second pro se petition for a writ of habeas corpus with the United States District Court for the Eastern District of Michigan, Southern Division, raising the ineffective assistance of trial and appellate counsel claims. Petitioner filed a Rule 9 motion to dismiss, claiming that the State had been prejudiced by Respondent's delay in bringing the effective assistance of counsel claims; and, that Respondent had abused the writ. Petitioner also argued that the conclusion of the State trial court following the evidentiary hearing on Respondent's claims of ineffective assistance of counsel was entitled to the presumption of correctness under 28 U.S.C. §2254 (d)[28 U.S.C.S. §2254(d)], and was binding upon the federal district court.

On March 29, 1985, the Honorable Ralph M. Freeman, District Court Judge, referred Petitioner's "presumption of correctness" claim to United States Magistrate Thomas A. Carlson who was also directed to conduct an evidentiary hearing "on both the threshold question of the applicability of Rule 9 and the merits of the ineffective assistance of counsel claim".

On August 26, 1985, Magistrate Carlson conducted the evidentiary hearing. On October 2, 1985, the deposition of Augustus Jackson-El was filed.

Respondent testified, at evidentiary hearing in both the State trial court and the federal district court, that he informed his trial counsel, Mr. Stern, of the existence of witnesses who could substantiate that he was with his girlfriend visiting her relatives in Cleveland, Ohio at the time the murder took place in Detroit, Michigan. He also told trial counsel about Little Jack and attempted to convince the attorney to interview and present him as a defense witness. However, according to Respondent, Mr. Stern

refused to do so, stating that Little Jack would not be credible witness because he was in prison. Trial counsel further informed Respondent that the prosecution did not have a case and it was not necessary to produce the Cleveland witnesses.

Respondent also testified that he told his appellate counsel, Mr. Solomon, about the existence of Little Jack, the Cleveland witnesses, and trial counsel's failure to investigate, interview and produce those witnesses at his trial. Respondent wanted Mr. Solomon to raise the issue of ineffective assistance of trial counsel on direct appeal. However, according to Respondent, Mr. Solomon told him that the ineffective assistance of trial counsel claim would be frivolous because "it might have been the best strategy in the world not to bring the witnesses".

Respondent's girlfriend at the time of the murder, Yvonne Hawkins Fair, testified at both evidentiary hearings that she and the Respondent were visiting her relatives in Cleveland, Ohio on the day the murder took place in Detroit, Michigan. Her testimony was corroborated at the evidentiary hearing conducted in the federal district court by her sister, her father and a neighbor of her family in Cleveland, Ohio.

Respondent's trial counsel, Mr. Stern, testified at both evidentiary hearings that he could not recall whether Respondent had mentioned Little Jack to him prior to trial. He also testified that he could remember little, if anything, about Respondent's trial, and he had no recollection of anything concerning the Cleveland witnesses. The trial transcript, p. 5, reveals that Mr. Stern was present in court when his client, the Respondent, stated to the Court that the Court "hampered my defense in keeping me locked up, and I can't find several of my witnesses. * * * " Mr. Stern's presence at the time of this statement was not brought to the attention of Magistrate Carlson, Judge Freeman or the Sixth Circuit Court of Appeals. Mr. Stern further testified that he could not locate his files on the case. There is no evidence in the record indicating whether Mr. Stern reviewed the court file, or otherwise knew the reason for Mr. Price's withdrawal as original trial counsel in this case.

Appellate counsel, Mr. Solomon, testified at both evidentiary hearings. He testified at the State court evidentiary hearing that he did not remember Respondent complaining about his trial representation. However, at the Federal evidentiary hearing he testified that he vaguely remembered Respondent telling him something about an alibi defense. He testified that he must have asked Mr. Stern about the matter and was satisfied with his law partner's answer, as he did not raise the ineffective assistance of counsel issue on direct appeal. But, like Mr. Stern, he had no firm recollection of Respondent's case, and he, too, could not locate his files.

Mr. Jackson-El testified personally at the State court evidentiary hearing, and by deposition in Federal District Court, that two police officers attempted to coerce him into testifying against Respondent to corroborate the testimony of Ms. Malone. He refused to do so because her story was not true. Mr. Jackson-El testified that on the night he visited Ms. Malone, the night of the murder, Respondent was not with him.

On April 25, 1986, Magistrate Carlson issued his Magistrate's Report and Recommendation. In addressing and rejecting the merits of Petitioner's presumption of correctness claim, Magistrate Carlson determined that the State court's findings of fact after the evidentiary hearing did not adequately develop and resolve the factual issues. (Appendix A, page 29a) Magistrate Carlson also reasoned that the State finding was not fairly supported by the record because it was "very difficult to determine whether the trial judge rejected (Respondent's) allegations that he told Mr. Stern about his witnesses or whether he accepted these allegations but denied his claim as a matter of law." (Appendix A, page 29a) Magistrate Carlson noted also that under Strickland v. Washington, 466 U.S. 668, 80 L. Ed.2d 674, 104 S. Ct. 2052 (1984), questions of ineffective assistance of counsel are generally mixed questions of law and fact which are not entitled to the presumption of correctness. (Appendix A, page 29a) Magistrate Carlson also pointed out that it was questionable whether the State court applied the correct legal standard to Repondent's ineffective

assistance of counsel claims as Strickland was not decided until almost two years after the State court hearing. Consequently, he concluded, "the statutory presumption of correctness should not apply in this case." (Appendix A, page 34a) Magistrate Carlson also recommended that Petitioner's Rule 9 Motion to Dismiss should be denied; and, that Respondent's Petition for a Writ of Habeas Corpus should also be denied. (Appendix A, page 52a)

The last paragraph of the Magistrate's Report and Recommendation contained the following notice:

> "The parties are advised that any objections to this Report and Recommendation must be filed with the Court within ten (10) days after they are served with a copy or further appeal from Judge Freeman's acceptance thereof is waived. United States v. Walters, 638 F.2d 947 (6th Cir. 1981). See also Thomas v. Arn, U.S., 106 S. Ct. 466 (1985)."

(Appendix, page 53a)

On May 5, 1986, Respondent, through his attorney, filed his objections to the Magistrate's Report and Recommendation. In addition, on June 11, 1986, Respondent, in propria persona, also filed a letter containing objections intended to supplement those previously filed by his attorney. Petitioner did not file any objections to the Magistrate's Report and Recommendation.

On September 30, 1986, District Judge Freeman filed a Memorandum Opinion adopting the Magistrate's recommendation and entered an Order denying Respondent's Petition for a Writ of Habeas Corpus. (Appendix B)

Respondent filed an appeal with the United States Sixth Circuit Court of Appeals upon the District Court's Order denying his Petition for a Writ of Habeas Corpus. Petitioner did not cross-appeal, or claim in his opposing Brief on Appeal, the conclusion of the District Court that the findings of the State Court were not entitled to the statutory presumption of correctness. Instead, Petitioner relied upon the District Court's findings of fact and conclusions of law to prevail on appeal. However, the Sixth Circuit Court of Appeals reversed and remanded this case to the District Court with instructions to issue the writ of habeas corpus. (Appendix C) The mandate was issued on February 21, 1989.

Petitioner filed a Petition for Rehearing with suggestion for rehearing en banc in which he raised for the first time in the Sixth Circuit Court of Appeals that the findings of the State trial court were entitled to the statutory presumption of correctness under 28 U.S.C. §2254(d)[28 U.S.C.S. §2254(d)].

On February 10, 1989, the Sixth Circuit Court of Appeals denied Petitioner's Petition for Rehearing en banc. (Appendix D) On March 15, 1989, the Sixth Circuit Court of Appeals issued an Order recalling the mandate pending discretionary review by this Honorable Court.

Petitioner has now filed a Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals with this Honorable Court.

* * *

REASONS AGAINST GRANTING THE WRIT

I.

A. Petitioner Failed in the Courts Below to Raise or Properly Preserve the Question Presented for Review.

The question Petitioner presents to this Honorable Court for review is whether conclusions made by the State trial court and Federal District Court after evidentiary hearings upon the merits of claims of ineffective assistance of counsel are entitled to presumed to be correct under 28 U.S.C. §2254(d)[28 U.S.C.S. §2254(d)]; and/or, are binding upon the Sixth Circuit Court of Appeals under Rule 52(a) of the Federal Rules of Civil Procedure.

The Magistrate's Report and Recommendation, which was adopted by the District Court, found that the statutory presumption of correctness did not apply to this case. Petitioner filed no objections to the Magistrate's Report and Recommendation.

Respondent sought review of the District Court's final Order denying his Petition for a Writ of Habeas Corpus in the Sixth Circuit Court of Appeals. Petitioner had the opportunity to file a cross-appeal suggesting, as he does now, that the credibility determinations and conclusions of the State trial court and Federal District Court are entitled to the statutory presumption of correctness; and/or, are binding upon the Sixth Circuit Court

of Appeals under the "clearly erroneous" standard of review. However, Petitioner never sought to correct the adopted Magistrate's opinion on appeal, nor did he argue that the District Court's conclusions were binding upon the Court of Appeals. Instead, Petitioner acquiesced in the Magistrate's and District Court's view of Respondent's ineffective assistance of counsel claims and argued in support of that view in the Sixth Circuit Court of Appeals. Then, when his argument failed, Petitioner sought to revive his present presumption of correctness claim by raising it for the first time in the Sixth Circuit Court of Appeals in a Petition for Rehearing with suggestion for rehearing en banc. Now, Petitioner seeks to resurrect the presumption of correctness claim in this litigation by way of certiorari in this Court. In addition, he has added the alternative claim for the first time in this litigation, that the conclusions of the Federal District Court are binding upon the Sixth Circuit Court of Appeals under the "clearly erroneous" standard of review.

Petitioner, through his assertions, concessions, omissions, and acquiescence in the opinions of the courts below, has lost his standing to now claim that he is either entitled to the statutory presumption of correctness, or that the conclusions of the Federal District Court are binding upon the Sixth Circuit Court of Appeals under the "clearly erroneous" standard of review. Petitioner has failed to properly preserve this two-prong attack by raising the question consistently or in a timely fashion during the course of this litigation.

In United States v. Walters, 638 F2d 947 (6th Cir., 1981), the Sixth Circuit Court of Appeals established the prospective rule that failure of a party to file timely objections to the Magistrate's Report and Recommendation with the District Court within ten (10) days after they are served with a copy waives subsequent review in the Court of Appeals. 28 U.S.C.§636(b) [28 U.S.C.S. §636(b)]. See also Paterson v. Mintzes, 717 F.2d 284, 286 (6th Cir., 1983); United States v. Martin, 704 F.2d 267, 275 (6th Cir., 1983).

In Thomas v. Arn, 474 U.S. 140, 88 L.Ed.2d 435, 106 S. Ct. 466, rehearing denied, 474 U.S. 1111, 88 L.Ed.2d 933, 106 S. Ct. 899 (1985), this Court affirmed the sound reasoning implementing the Sixth Circuit's procedural waiver rule as "a valid exercise of supervisory power that does not violate either the Federal Magistrate's Act or the Constitution." Id., 474 U.S. at 155; 88 L.Ed.2d at 448-449.

This Court has adopted a similar waiver rule by traditionally denying certiorari on issues which have not been raised in the courts below, or which were otherwise not properly preserved for review in the Supreme Court. Tyrrell v. District of Columbia, 243 U.S. 1, 61 L.Ed 557, 37 S. Ct. 361 (1917); Husty v. United States, 282 U.S. 694, 701-702, 75 L.Ed. 629, 632-633, 51 S. Ct. 240, 74 ALR 1407 (1931); California v. Taylor, 353 U.S. 553, 557, n.2, 1 L.Ed2d 1034, 1037, 77 S. Ct. 1037 (1957); Giordenello v. United States, 357 U.S. 480, 2 L.Ed.2d 1503, 78 S. Ct. 1245 (1958); Lawn v. United States, 355 U.S. 339, 2 L.Ed.2d 321, 78 S. Ct. 311, rehearing denied, 355 U.S. 967, 2 L.Ed.2d 542, 78 S. Ct. 529 (1958); Neely v. EBY Construction Co., 386 U.S. 317, 18 L.Ed.2d 75, 37 S. Ct. 1072 (1967); Cardinale V. Louisana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S. Ct. 1161 (1969); Adickes v. S. H. Kress & Co., 398 U.S. 144, 26 L.Ed.2d 142, 90 S. Ct. 1598 (1970); Ramsey et al. v. United Mine Workers of America, 401 U.S. 302, 28 L.Ed.2d 64, 91 S. Ct. 658 (1971); Tacon v. Arizona, 410 U.S. 351, 35 L.Ed.2d 346, 93 S. Ct. 998 (1973); Schesinger v. Councilman, 420 U.S. 738, 43 L.Ed.2d 591, 95 S. Ct. 1300 (1975); United States v. Lovasco, 431 U.S. 783, 52 L.Ed.2d 752, 97 S. Ct. 2044 (1977). Cf., Duignan v. United States, 274 U.S. 195, 200, 71 L.Ed. 996, 47 S. Ct. 566 (1927); Blair v. Oesterlein Machine Co., 275 U.S. 220, 72 L.Ed. 249, 48 S. Ct. 87 (1927); McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 84 L.Ed. 849, 60 S. Ct. 670 (1940).

This Court has also consistently dismissed a Petition for a Writ of Certiorari as improvidently granted once it was determined that the issue upon which certiorari had been granted had not been raised in the courts below or was otherwise not properly preserved for review by this Court. Tyrrell v. District of Columbia, 243 U.S.

1, 61 L.Ed. 557, 37 S. Ct. 361 (1917); McCarthy v. Bruner, 323 U.S. 673, 89 L.Ed. 457, 65 S. Ct. 126 (1944); McCullough v. Krannereer Corp., 323 U.S. 327, 89 L.Ed. 273, 65 S. Ct. 297 (1945); Palmieri v. Florida, 393 U.S. 218, 21 L.Ed. 2d 389, 89 S. Ct. 440, rehearing denied, 393 U.S. 1045, 21 L.Ed.2d 596, 89 S. Ct. 611 (1968); DeBacker v. Brainard, 396 U.S. 28, 24 L.Ed.2d 148, 90 S. Ct. 163 (1969).

It is true that Petitioner argued in support of the views of the State trial court and Federal District Court in the Sixth Circuit Court of Appeals. However, a general argument is wholly insufficient to properly raise or preserve the specific claims that the State trial court and Federal District Court credibility determinations and conclusions are entitled to the presumption of correctness and/or are binding upon the Sixth Circuit Court of Appeals. On Lee v. United States, 343 U.S. 747, 750, n. 3, 96 L.Ed 1270, 1273, n. 3, 72 S. Ct. 967, 970, n. 3 (1952). See also, 1 Wigmore, Evidence §18, at 352 (3rd Ed., 1940).

It is equally true that Petitioner specifically raised his present claims in the Sixth Circuit Court of Appeals in his Petition for Rehearing en banc. However, this Court has traditionally refused to consider issues presented for the first time on rehearing. American Surety Co. v. Baldwin, 287 U.S. 156, 77 L.Ed. 231, 53 S. Ct. 98 (1932) 86 ALR 298; Missouri P. R. Co. v. Hanna, 266 U.S. 184, 69 L.Ed. 235, 45 S. Ct. 36 (1924); Ellison v. Koswig, 276 U.S. 598, 72 L.Ed. 724, 48 S. Ct. 320 (1928); Monks v. New Jersey, 398 U.S. 71, 26 L.Ed.2d 54, 90 S. Ct. 1563 (1970).

Petitioner chose to defend the Magistrate's and District Court's view of Respondent's ineffective assistance of counsel claims before the Sixth Circuit Court of Appeals. However, having failed to prevail in the Court of Appeals on that argument, Petitioner now desires to revert to his original argument that the conclusions of the State trial court are entitled to the statutory presumption of correctness; and/or raise the new claim that the determinations and conclusions of the Federal District Court are binding upon the Sixth Circuit Court of Appeals under the "clearly erroneous" standard of review. In this manner, Petitioner is relieved of the

task of attempting to defend before this Court the clearly erroneous view of the District Court against the majority opinion of the Sixth Circuit Court of Appeals. This procedure, if condoned, also has the tactical advantage of allowing Petitioner to "sandbag" the Sixth Circuit Court of Appeals by failing to first present his claims in that court.

In Steagald v. United States, 451 U.S. 204, 208, 68 L.Ed.2d 38, 43, 101 S. Ct. 1642 (1981), this Court refused to consider the Government's claims that the petitioner in that case had no expectation of privacy in a house sufficient to prevail on a Fourth Amendment claim. This Court held that the Government had lost its right to challenge the Petitioner's assertion that he possessed a legitimate expectation of privacy in the searched home when the Government had made contrary assertions in the courts below, acquiesced in contrary findings by those courts, and failed to raise the challenge in a timely fashion during the litigation.

In the instant case, the Petition for a Writ of Certiorari should be denied because Petitioner has failed to properly raise or preserve the question in the courts below which he now presents for review by this Honorable Court.

B. The Purely Factual Nature of the Question Presented for Review is Special and Important Only to the Particular Parties, as Distinguished from the General Public.

This Court's review by a writ of certiorari is not a matter of right, but of judicial discretion, Durham v. United States, 401 U.S. 481, 28 L.Ed.2d 200, 91 S. Ct. 858 (1971), and will be granted only when there are special and important reasons, Fay v. Noia, 372 U. S. 391, 9 L.Ed.2d 837, 83 S. Ct. 822 (1963). See also, U.S. Supr. Ct. Rule 17, 28 U.S.C.A.

In this case, the Petition for a Writ of Certiorari involves no more than an expression of Petitioner's personal dissatisfaction with the Sixth Circuit Court of Appeals' application of issues of fact to the performance and prejudice components of the ineffective assistance of counsel analysis enunciated by this Court in Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct.

2052, rehearing denied, 467 U.S. 1267, 82 L.Ed.2d 864, 102 S. Ct. 3562 (1984). Therefore, it should be clear by the purely factual nature of this case that it is special and important only to the particular parties, as distinguished from the general public; and, as such, does not raise a question of constitutional dimension warranting review on certiorari. Rice v. Sioux City Memorial Park Cementry, 349 U.S. 70, 99 L.Ed. 897, 75 S. Ct. 614 (1955).

The factual findings of the Federal District Court are set forth in the Magistrate's Report and Recommendation, including those pertaining to witness credibility. The findings of the District Court essentially supplement the roughly corresponding findings of the State trial court. The findings of fact set forth in the majority opinion of the Sixth Circuit Court of Appeals, including those pertaining to witness credibility determinations, are drawn from the record and do not conflict with, or contradict, any findings of basic, primary, or historical facts made by either the State trial court or the Federal District Court. There is also no apparent legal dispute between the lower courts as to the correct application of the constitutional principles enunicated by this Court in Strickland, supra, pertaining to the analysis of an ineffective assistance of counsel claim.

The dispute between the parties, and the difference of opinion between the Sixth Circuit Court of Appeals and the two lower courts, arises not so much over the elemental facts of this case, or the appropriate application of constitutional principles, as it does over the varying significance to be attached to those facts in application to the performance and prejudice components of the ineffectiveness analysis. Neil v. Biggers, 409 U.S. 188, 193, n. 3, 34 L.Ed.2d 401, 93 S. Ct. 375 (1972); Sumner v. Mata I, 449 U.S. 539, 66 L.Ed.2d 722, 101 S. Ct. 764 (1981) [Brennan, J., dissenting].

In short, the subject matter of this case does not involve conflicts of decisions with other courts on the same issue conflicts with applicable decisions of this Court; or, even a federal question of substance. But, rather, the subject matter involves strictly an interpretation of the facts of this case as they apply to the

performance and prejudice components of the ineffectiveness of counsel analysis. The Sixth Circuit Court of Appeals' opinion differs from the two lower courts only as to the application of the evidence adduced at both evidentiary hearings, which was either overlooked or ignored by the State trial court and the Federal District Court, to the performance and prejudice components of the ineffective assistance of counsel analysis.

Petitioner attempts to raise the constitutional stature of this case, and give the issue an illusion of "a federal question of substance", by inviting this Court to utilize this case as a vehicle to issue a purely hypothetical and academic advisory opinion to "delineate more fully the principles regarding questions of 'fact' and questions of 'law' as they relate to the presumption of correctness and the clearly erroneous standard for federal review." See Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals, page 40.

In this case, however, the usual deference analysis under either 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)] or Rule 52(a) of the Federal Rules of Civil Procedure is not necessary as the presumption of correctness and the clearly erroneous standard of review do not apply to mixed questions of law and fact involved in the performance and prejudice components of the ineffectiveness analysis. Strickland v. Washington, supra, 446 U.S. at 698, 80 L.Ed.2d at 700, 104 S. Ct. at 2070.

In dismissing a writ of certiorari as improvidently granted in Rice v. Sioux City Memorial Park Cementery, supra, this court referred to the requirement of U.S. Supr Ct. Rule 19 (percursor to U.S. Supr. Ct. Rule 17), that there be "special and important reasons" for granting a writ of certiorari. The Court also referred to the provision relating to a State court decision of "a federal question of substance" in the sense that, abstractly considered, it might present an intellectually interesting and solid problem, but that the Supreme Court did not sit to satisfy a scholarly interest in such issues, nor did it sit for the benefit of particular litigants. It was noted that "special and

important reasons" implied a reach to a problem beyond the academic, episodic, or hypothetical, and that this was especially true where the issues involved reached constitutional dimensions, for then there came into play regard for the Supreme Court's duty to avoid decisions of constitutional issues unless avoidance became evasion. It was concluded that if a recently enacted State statute had been properly brought to the Supreme Court's attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly been brought to the Supreme Court in the first instance See also, Conway v. California Adult Authority, 396 U.S. 107, 24 L.Ed.2d 295, 90 S. Ct. 312, rehearing denied, 396 U.S. 1030, 24 L.Ed.2d 527, 90 S. Ct. 544 (1969).

The purely factual nature of this case obviously involves only the application of facts to the constitutional principles enunciated in Strickland, and is special and important only to the particular parties, and not to the general public. The appropriate disposition in such a situation is to deny the Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals inasmuch as a review of the facts would be of no importance except to the immediate litigants. Houston Oil Co. v. Goodrich, 245 U.S. 440, 62 L.Ed. 385, 38 S. Ct. 140 (1918); Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 67 L.Ed. 712, 43 S. Ct. 4 2 (1923); Southern Power Co. v. Public Service Co., 263 U.S. 508, 68 L.Ed. 413, 44 S. Ct. 164 (1924); Rudolph v. United States, 370 U.S. 269, 8 L.Ed.2d 484, 82 S. Ct. 1277, rehearing denied, 371 U.S. 854, 9 L.Ed.2d 93, 83 S. Ct. 15 (1962).

II.

A. The Credibility Assessment of Witnesses Who Were Called Upon to Testify at the State Trial Court and Federal District Court Evidentiary Hearings, Which Formed the Basis for the Conclusions that Trial Counsel had Rendered Effective Assistance, Are Neither Historical Findings of Fact Presumed to be Correct Under 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)], nor Binding Upon the Sixth Circuit Court of Appeals Under the Clearly Erroneous Standard of Review of Rule 52(a) of the Federal Rules of Civil Procedure.

The crux of Petitioner's argument is that the State trial court's assessment of the credibility of witnesses who were called upon to testify at the State evidentiary hearing, which formed the basis for rejecting Respondent's claims that the performance of his trial counsel had been deficient, and had been prejudiced by that deficient performance, are historical findings of fact entitled to be presumed to be correct under 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)]. Petitioner alternatively argues that, even if the statutory presumption of correctness does not apply in this case, the roughly corresponding witness credibility assessments made at the evidentiary hearing conducted in the Federal District Court, which essentially supplements the determinations of the State trial court, are subject to the deference requirement of Rule 52(a) of the Federal Rules of Civil Procedure under the clearly erroneous standard of review.

In a federal habeas corpus challenge to a State criminal judgment, State court findings of fact made in the course of deciding a claim of ineffective assistance of counsel are subject to the requirements of 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)]. Strickland v. Washington, 466 U.S. 668, 698, 80 L.Ed.2d 674, 700, 104 S. Ct. 2052, 2070, rehearing denied, 467 U.S. 1267, 82 L.Ed.2d 864, 104 S. Ct. 3562 (1984). Similarly, Federal District Court findings of fact made in the course of deciding whether counsel rendered effective assistance are subject to the clearly erroneous standard of review under Rule 52(a) of the Federal Rules of Civil Procedure. Id., 466 U.S. at 698, 80 L.Ed.2d at 700, 104 S. Ct. at 2070. Those antecedent findings, which either a federal district court or court of appeals may be required to accept, are limited to what are termed "basic, primary, or historical facts". Townsend v. Sain, 372 U. S. 293, 309, n. 6, 9 L.Ed.2d 770, 83 S. Ct. 745 (1963). The performance and prejudice components underlying the ultimate determination of whether counsel rendered effective assistance under the Sixth Amendment are mixed questions of law and fact which are not entitled to the presumption of correctness under 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)], or subject to

the clearly erroneous standard of review under Rule 52(a) of the Federal Rules of Civil Procedure. Id., 466 U.S. at 698, 80 L.Ed.2d at 700, 104 S. Ct. at 2070. See also, Kimmelman v. Morrison, 477 U.S. 365, 389, 91 L.Ed.2d 305, 106 S. Ct. 2574 (1986).

The history of cases coming before this Court, both on direct appeal and on review of applications to lower federal courts for a writ of habeas corpus, particularly those relating to claims of ineffective assistance of counsel, all hold that conclusions which involve mixed questions of law and fact require independent federal determination and full appellate review, and are not subject to the presumption of correctness. Helvering v. Rankin, 295 U.S. 123, 131, 79 L.Ed. 1343, 55 S. Ct. 732 (1935); Bohardus v. Commissioner, 302 U.S. 34, 39, 82 L.Ed. 32, 58 S. Ct. 61 (1937); Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 491, 81 L.Ed. 755, 57 S. Ct. 569 (1937); Pate v. Robinson, 383 U.S. 375, 385-386, 15 L.Ed.2d 815, 86 S. Ct. 836 (1966); Boyd v. Dutton, 405 U.S. 1, 30 L.Ed.2d 755, 92 S. Ct. 759 (1972) [waiver of right of counsel]; Neil v. Biggers, 409 U.S. 188, 193, n. 3, 34 L.Ed.2d 401, 93 S. Ct. 375 (1972); Drope v. Missouri, 420 U.S. 162, 174-175, n. 10, 43 L.Ed.2d 103, 95 S. Ct. 896 (1975); Brewer v. Williams, 430 U.S. 387, 51 L.Ed.2d 424, 97 S. Ct. 1232, rehearing denied, 431 U.S. 925, 53 L.Ed.2d 240, 97 S. Ct. 2200 (1977) [waiver of right to counsel required application of constitutional principles to the facts of the case]; Wainwright v. Sykes, 433 U.S. 72, 87, 53 L.Ed.2d 594, 97 S. Ct. 2497 (1977); Cuyler v. Sullivan, 446 U.S. 335, 64 L.Ed.2d 333, 100 S. Ct. 1708 (1980)[multiple representation of criminal defendants by defense counsel was a mixed question of law and fact that required application of legal principles to the historical facts of the case and was not entitled to the presumption of correctness]; Strickland v. Washington, 466 U.S. 668, 698, 80 L.Ed.2d 674, 700, 104 S. Ct. 2052, 2070, rehearing denied, 467 U.S. 1267, 82 L.Ed.2d 864, 104 S. Ct. 3562 (1984) [ineffective assistance of counsel question is not a finding of fact entitled to presumption of correctness]; Miller v. Fenton, 474 U.S. 104, 88 L.Ed.2d 405, 106 S. Ct. 445 (1985); Kimmelman v. Morrison, 477 U.S. 365, 91 L.Ed.2d

305, 106 S. Ct. 2574 (1986) [statement of trial judge at suppression hearing not a finding of fact entitled to the presumption of correctness in ineffective assistance of counsel claim]. See also, White v. Estelle, 459 U.S. 118, 74 L.Ed.2d 973, 103 S. Ct. 757 (1983) [Marshall, J., dissenting from denial of certiorari]; Johnson v. Salisbury, 448 F.2d 374, 377 (6th Cir., 1971); Stafos v. Jarvis, 477 F.2d 369, 372 (10th Cir., 1973); United States ex rel. Johnson v. Johnson, 531 F.2d 169, 172, n. 12 (3rd Cir., 1976); Fowler v. Jago, 683 F.2d 983 (6th Cir., 1983), cert. denied, 460 U.S. 1098 (1984).

Petitioner believes that a substantial body of contrary precedent is controlling in this case in light of this Court's intermittent holdings addressing the scope of the presumption of correctness. Maggio v. Fulford, 462 U. S. 111, 76 L.Ed.2d 794, 103 S. Ct. 2261 (1983)(per curiam)[competency to stand trial]; Rushen v. Spain, 464 U.S. 114, 120, 78 L.Ed.2d 267, 274, 104 S. Ct. 453, 465 (1983)(per curiam) [effect of ex parte communication on the impartiality of a juror]; Patton v. Yount, 467 U.S. 1025, 81 L.Ed.2d 847, 104 S. Ct. 2885 (1984) [impartiality of an individual juror]; Marshall v. Longberger, 469 U.S. 422, 432, 74 L.Ed.2d 646, 657, 103 S. Ct. 843, 850 (1985) [determination of voluntariness of guilty plea]; Wainwright v. Witt, 469 U.S. 412, 429, 83 L.Ed.2d 841, 105 S. Ct. 844 (1985) [trial court's determination that juror was properly excluded for cause entitled to the presumption of correctness].

In Miller v. Fenton, 474 U.S. 104, 88 L.Ed.2d 405, 106 S. Ct. 445 (1985), although this Court acknowledged that it has not chartered an entirely clear course in the area dealing with the presumption of correctness, the Court nonetheless unequivocally rejected a claim identical to Petitioner's present claim, that those contrary case-specific holdings tactically overturned the long standing rule that conclusions which involve mixed questions of law and fact are not entitled to the presumption of correctness, and are matters for independent federal determination. Id.

Petitioner cites Anderson v. Bessemer City, 470 U.S. 564, 84 L.Ed.2d 518, 105 S. Ct. 1504 (1985) in support of his alternative

argument that even if the statutory presumption of correctness does not apply to this case, the Sixth Circuit Court of Appeals was still required to accord a high degree of deference to the witness credibility determinations of the Federal District Court under the clearly erroneous standard of review. However, the deference teachings of Anderson are as inapplicable to this case as the clearly erroneous standard of review.

The subsidiary findings made by the District Court concerning basic historical facts are subject to review under the deference requirement of the clearly erroneous standard of review. Strickland v. Washington, supra, 466 U.S. at 698. However, the Sixth Circuit Court of Appeals was not bound by the District Court's interpretation of the evidence, including those pertaining to witness credibility determinations, or conclusions of law, when analyzing the performance and prejudice components underlying the District Court's ultimate conclusion that counsel had rendered effective assistance or that Respondent had not been prejudiced by a deficient performance. But, rather, these are matters subject to full appellate review. Id., 466 U.S. at 698. See 9 Wright & Miller, Federal Practice and Procedure, Civil §§ 2588, 2589; Wright, Law of Federal Courts, 2d Ed., §96.

Petitioner attempts to raise the constitutional stature of this case, or give the issue an illusion of "a federal question of substance", by inviting this Court to utilize this case as a vehicle to "delineate more fully the principles regarding questions of 'fact' and questions of 'law' as they relate to the presumption of correctness and clearly erroneous standard for federal review." See Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals, page 40. In reality, Petitioner characterizes, and invites this Court to make the witness credibility determinations of the State and Federal District Court as "classical[ly] questions of [basic, primary or historical] fact", subject to the deference requirements of either 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)], or Rule 52 (a) of the Federal Rules of Civil Procedure.

Petitioner points out, as acknowledged by this Court in Miller v. Fenton, 474 U.S. 104, 113-114, 88 L.Ed.2d 405, 413-414,

106 S. Ct. 445, 452 (1985), the long standing difficulty in distinguishing an issue as one of "law", "fact", or "mixed question of law and fact". However, in contrast to more difficult cases or situations, it is not difficult in this case to make the distinction whether the issue of the witnesses' credibility is a question of historical fact subject to the deference requirements, or a mixed question of law and fact subject to independent federal determination and full appellate review.

In Baumgartner v. United States, 322 U.S. 665, 88 L.Ed. 1525, 64 S. Ct. 1240 (1944), the issue was whether or not the findings of two lower courts satisfied the clear-and-convincing standard of proof necessary to sustain a denaturalization decree. This Court held that the conclusion of the two lower courts that the exacting standard of proof had been satisfied was not an unreviewable finding of fact but one that a reviewing court could independently assess. The Court referred to the finding as one of "ultimate" fact, which in that case involved an appraisal of the strength of the entire body of evidence. The Court said that the significance of the clear-and-convincing proof standard "would be lost" if the ascertainment by the lower courts whether the exacting standard of proof had been satisfied on the whole record were to be deemed a "fact" of the same order as all of the other "facts not open to review here". Id., 322 U.S. at 671. The Baumgartner discussion of "ultimate facts" referred not to the pure findings of fact, but to findings that "clearly impl[y] the application of standards of law".

The Baumgartner definitions may be of little assistance in more difficult cases involving extremely complicated situations; however, these definitions offer sufficient guidance to resolve the issue in this case.

Beyond a doubt, assuming arguendo that the performance and prejudice components of mixed law and fact turned on witness credibility determinations, then they are "facts" which "clearly impl[y] the application of standards of law" in ultimately deciding whether the performance of trial counsel had been

deficient, or that Respondent had been prejudiced by trial counsel's deficient performance. These "facts" which go to the very heart of Respondent's claim of ineffective assistance of counsel, cannot logically or possibly be denominated as subsidiary, basic, primary, or historical facts protected by the statutory presumption of correctness, or insulated from review by the deference requirement of the clearly erroneous standard of review. As this Court pointed out in Anderson v. Bessemer City, supra, 470 U.S. at 575, 84 L.Ed.2d at 529:

> "This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so "internally inconsistent or implausible on its face that a reasonable fact finder would not cre it it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination." (Citation omitted.)

The Opinion and disposition of this case by the Sixth Circuit Court of Appeals did not, as Petitioner suggests, turn on a redetermination of the credibility of Respondent's testimony, or that of the other witnesses. Smith v. Butler, 366 U.S. 161, 6 L.Ed.2d 184, 81 S. Ct. 937, rehearing denied, 366 U.S. 941, 6 L.Ed.2d 852, 81 S. Ct. 1657 (1961). The findings of fact set forth in the majority opinion of the Court of Appeals, including those pertaining to witness credibility, are drawn from the record and do not conflict with, or contradict, any findings of basic, primary, or historical facts found by either the State trial court or the Federal District Court. The opinion of the Sixth Circuit Court of Appeals differs from that of the lower courts only in the application of the facts adduced at both evidentiary hearings to the performance and prejudice components of the ineffective assistance of counsel analysis, which was either overlooked or ignored by the two lower courts.

It was not, as Petitioner claims, a reassessment of Respondent's testimony for the Sixth Circuit Court of Appeals to

make the accurate factual observation that his testimony was uncontradicted at either evidentiary hearing. Such an observation also does not run afoul of this Court's admonition in Marshall v. Lonberger, 459 U.S. 422, 434, 74 L.Ed.2d 646, 658, 103 S. Ct. 843, 851 (1983), as the deference requirement of 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)] does not apply to the performance and prejudice analysis. Strickland v. Washington, supra, 466 U.S. at 698. In addition, the Court of Appeals simply made an observation that is part of the description of this case; and, unlike the lower court in Marshall v. Lonberger, supra, did not rely solely on Respondent's uncontradicted testimony in reaching its ultimate decision.

It was not, as Petitioner asserts, conjecture or a reassessment of Respondent's testimony for the Court of Appeals to say that Respondent "...unquestionably mentioned them (his defense and alibi witnesses) to both Price and Solomon..." Mr. William Price, the originally court-appointed trial counsel, submitted an affidavit in the Federal District Court in which he averred that he withdrew as Respondent's trial attorney "...inasmuch as my trial calendar would not permit me to interview the several witnesses that the (Respondent) had in the State of Ohio and initiate other investigations necessary to provide the (Respondent) with an opportunity for a fair trial." See Affidavit of William L. Price, September 19, 1985. Mr. Barry Solomon, Respondent's court-appointed appellate counsel, testified at the evidentiary hearing in Federal District Court that he remembered Respondent telling him something about Mr. Stern (trial counsel) not calling his alibi witnesses in defense at his trial.[1] (EH-2, page 16)

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1. The Court of Appeals was not in error, as Petitioner mistakenly believes, in its stat ment that Respondent "...unquestionably mentioned them (the witnesses to both Price and Solomon..." Respondent unquestionably told his original court-appointed trial counsel (Price) and his court-appointed appellate counsel (Solomon) about the existence of his defense and alibi witnesses. See Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals, page 36, fn.1.

He testified that he must have asked his law partner (Mr. Stern) about the matter, and was satisfied with his answer because he did not raise the issue on direct appeal. (EH-2, pages 16-17) Plainly, the asserted "conjecture" or "reassessment" is, in reality, factual evidence in this case drawn directl from the record.

It is true that the Court of Appeals stated that there was no evidence on the record to indicate that trial counsel knew the reason for Mr. Price's withdrawal from the case. Yet, Mr. Stern knew of Respondent's claim of the existence of defense witnesses by reason of his presence when Respondent complained to the trial court that "you hampered my defense by keeping me locked up and I can't find several of my witnesses." (TT, page 5) Respondent's indignant complaints and outbursts could not have possibly escaped Mr. Stern's attention. The Court of Appeals acknowledged that Respondent did object to the trial court's "hampering" of his defense by preventing him from finding his witnesses.

It was not, as Petitioner alle es, a blatant example of appellate reassessment for the Court of Appeals to say that "...no conceivable reason exists for him (Respondent) to have withheld this information (existence of his witnesses) from his counsel ..." Respondent told his original counsel, Mr. Price, about his witnesses; he complained to the trial court about his need and inability to contact his witnesses; Mr. Stern was present during Respondent's claim in open court concerning the existence of his witnesses; and, later, Respondent informed his appellate counsel, Mr. Solomon, that trial counsel had failed to investigate, interview and produce his witnesses at trial. The Court of Appeals was simply pointing out that it was highly unlikely, implausible and internally inconsis ent for the District Court to conclude that out of all of the people involved in this case, Respondent "chose not to tell Stern" of the existence of his defense and alibi witnesses. The more logical conclusion is that if Mr. Stern did not investigate the defense witness, Mr. Jackson-El, when Respondent brought him to Mr. Stern's attention, that he also did not investigate the alibi witnesses when

Respondent brought them to his attention.

It is true that Respondent was a very assertive, vocal, and probably indignant person at trial; and, contrary to Petitioner's allegations, Respondent did immediately raise the issue of his alibi defense to Mr. Price, probably Mr. Stern, and Mr. Solomon on direct appeal. It is also true that the alibi issue was not specifically raised in the courts until the second series of appeals. However, that delay can be attributed to the ineffectiveness of trial counsel to present his alibi defense at trial; and, Mr. Solomon's refusal to raise the ineffectiveness issue on direct appeal against his law partner.

Finally, the Court of Appeals explained the reasons for its findings and conclusions after reviewing the entire record that, although there may be some evidence to support it, the District Court's determination that Respondent had not made a sufficient showing to establish that his claim of ineffective assistance of trial counsel was clearly erroneous. (Appendix, pages 85a-89a)

The usual deference analysis under 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)] is not appropriate in this case as the statutory presumption of correctness is inapplicable to the performance and prejudice components of the ineffective assistance of counsel analysis. Strickland v. Washington, supra, 466 U.S. at 698. However, even in applying those standards, it is noteworthy that the Federal courts are not necessarily bound by a State court's findings and conclusions. A Federal court may give different weight to the facts as found by a State court and may reach a different conclusion in light of the legal standard. Sumner v. Mata II, 455 U.S. 591, 597, 71 L.Ed.2d 480, 102 S. Ct. 1303 (1982).

It is also not necessary in this case to address the applicability of the deference requirement of Rule 52(a) of the Federal Rules of Civil Procedure, as that provision also does not apply to the performance and prejudice components of the ineffective assistance of counsel analysis. Strickland v. Washington, supra, 466 U.S. at 698. However, it is also noteworthy that Rule 52(a)

authorizes and requires appellate courts to review the entire record to determine if a district court's findings of fact or conclusions of law are clearly erroneous. To the extent that findings of fact depend upon credibility determinations, an appellate court is not relieved of its duty to determine if those findings were clearly erroneous. Rule 52(a) requires that an appellate court give due regard to " * * * the opportunity of the trial court to judge the credibility of the witnesses" it does not require that the appellate court unquestionably accept the credibility determinations of the lower court. An appellate court may reverse a district court's credibility determinations, findings of fact, or conclusions of law, even though there is evidence to support them, if the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed, and those determinations, findings or conclusions are clearly erroneous. United States v. United States Gypsum Co., 333 U.S. 364, 394, 395, 92 L. Ed. 746, 68 S. Ct. 525, rehearing denied, 333 U.S. 869, 92 L. Ed. 1147, 68 S. Ct. 788 (1948); Kelley v. Southern Pacific Co., 419 US. 318, 322, 323, 42 L. Ed.2d 498, 505, 95 S. Ct. 472 (1974); Anderson v. Bessemer City, 470 U.S. 564, 84 L. Ed.2d 518, 105 S. Ct. 1054 (1985).

In each case, "the federal habeas petitioner who claims he is detained pursuant to a final judgment of a State court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination * * * on the merits of that claim." Wainwright v. Sykes, 433 U.S. 72, 87, 53 L. Ed.2d 594, 97 S. Ct. 2497 (1977). The decision by a federal district court is subject to full appellate review by a federal court of appeals. Bohardus v. Commissioner, 302 U.S. 34, 39, 82 L. Ed. 32, 58 S. Ct. 61 (1937); Helvering v. Rankin, 295 U.S. 123, 131, 79 L. Ed. 1343, 55 S. Ct. 732 (1935). The deferential review urged by the Petitioner would have the practical effect of abolishing the habeas corpus statute as it applies to State prisoners, by depriving them of any realistic or meaningful habeas review, and placing the federal courts in a position of simply rubber-stamping State court action.

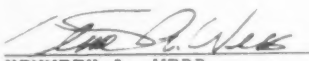
CONCLUSION

The bulk of this Court's cases addressing the issue, almost

without exception, foreclose Petitioner's contention that either the statutory presumption of correctness or the clearly erroneous standard of review applies to credibility determinations which involve a conclusion of questions of mixed law and fact; or, that the ineffective assistance of counsel analysis merits anything less than independent federal determination and full appellate review. Wainwright v. Sykes, 433 U.S. 72, 8 , 53 L. Ed.2d 594, 97 S. Ct. 2497 (1977). Of course, subsidiary basic, primary, or historical findings of fact made by a State court in the course of deciding a claim of ineffective assistance of counsel are entitled to the statutory presumption of correctness. Strickland v. Washington, supra, 466 U.S. at 698. The federal courts should give great weight to the considered conclusions of a co-equal State judiciary. Columbe v. Connecticut, 367 U.S. 568, 605 L. Ed.2d 1037, 81 S. Ct. 1860 (1961)[Opinion of Frankfurter, J.] Similarly, subsidiary basic, primary, or historical findings of fact made by a federal district court in the course of deciding an ineffective assistance of counsel claim are subject to the clearly erroneous standard of review. Strickland v. Washington, supra, 466 U.S. at 698. However, the ultimate question whether, under the totality of the circumstances, counsel rendered effective assistance in a manner compatible with the Sixth and Fourteenth Amendments to the United States Constitution, is still a matter for independent federal determination and full appellate review. Miller v. Fenton, 474 U.S. 104, 88 L. Ed.2d 405, 106 S. Ct. 445 (1985); Strickland v. Washington, supra.

WHEREFORE, for the foregoing reasons, Respondent, Curtis Lee Clark, respectfully prays that this Honorable Court deny the Petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,



KENNETH A. WEBB
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Dated: May 8, 1989

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT REDMAN,

Petitioner,

v.

CURTIS LEE CLARK,

Respondent.

No._____

OCTOBER TERM, 1989

NOTARIZED STATEMENT BY A MEMBER OF THE BAR OF THIS COURT SETTING FORTH THE DETAILS OF THE MAILING, AND STATING THAT TO HIS KNOWLEDGE THE MAILING TOOK PLACE ON MONDAY, MAY 8, 1989 PRIOR TO 11:55 P.M.

State of Michigan)

County of Oakland)

On this 8th day of May, 1989, there personally appeared before me, Kenneth A. Webb, who being first duly sworn, on his oath deposed and said, as follows:

1. That he is a member of the Bar of the Supreme Court of the United States.

2. That on this day, Monday, May 8, 1989, he personally deposited in a mailbox located outside the main post office in Royal Oak, Michigan located at 200 W. 2nd, 48067, Telephone 967-6500 with sufficent first-class postage affixed to envelopes containing copies of Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Motion for Leave to Proceed in Forma Pauperis, this Notarized Statement, Etc. and a copy of his Appearance and Certificate of Service, and which envelopes were plainly addressed to John D. O'Hair, Esq., Prosecuting Attorney of Wayne County, Attention: Timothy A. Baughman, Chief of Research, Training and Appeals and Don W. Atkins, Esq., Principal Attorney, Appeals, 12th Floor, 1441 St. Antoine St., Detroit, Michigan 48226 and to Hon. Frank J. Kelley, Attorney General of the State of Michigan, Law Building, 525 W. Ottawa Street, Lansing, Michigan 48913

3. That the deposit described in paragraph 2. of this statement was made prior to 11:55 p.m.

KENNETH A. WEBB, Attorney for Respondent, 2855 Coolidge Road, Suite 112-A, Troy, MI 48084

Subscribed and sworn to before me, a Notary Public for Oakland County, Michigan

Robert DeWitt My Commission expires:_____

IN THE UNITED STATES SUPREME COURT

ROBERT REDMAN,

Petitioner,

v.

CURTIS LEE CLARK,

Respondent.

No._____

OCTOBER TERM, 1989

/

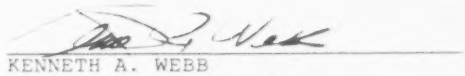
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served have been served with a true and correct copy of Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Motion for Leave to Proceed In Forma Pauperis, Respondent's Notarized Statement By a Member of the Bar of This Court Setting Forth the Details of the Mailing, and Stating that to his Knowledge the Mailing Took Place on Monday, May 8, 1989 Prior to 11:55 P.M., and a copy of this Certificate of Service. and a copy of his Appearance.

I FURTHER CERTIFY that such service was accomplished by deposit, on Monday, May 8, 1989, prior to 11:55 p.m., in a United States mailbox located outside the main post office in Royal Oak, Michigan located at 200 W. 2nd, 48067, Telephone 967-6500 with sufficient first-class postage affixed thereto, addressed to the following persons so required to be served:

1. Hon. John D. O'Hair, Esq., Prosecuting Attorney of Wayne County, Attention: Timothy A. Baughman, Chief of Research, Training and Appeals and Don W. Atkins, Esq., Principal Attorney, Appeals, 12th Floor, 1441 St. Antoine St., Detroit, Michigan 48226.

2. Hon. Frank J. Kelley, Attorney General of the State of Michigan, Law Building, 525 W. Ottawa Street, Lansing, Michigan 48913



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Dated: May 8, 1989